



May 30, 2001

Mr. S. Calvin Capshaw
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P.O. Box 3999
Longview, Texas 75606-3999

OR2001-2233

Dear Mr. Capshaw:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147766.

The East Texas Council of Governments (the "council"), which you represent, received a request for copies of two proposals, readers' comments pertaining to three proposals, and all fax transmissions between the readers of the proposals and council staff. You indicate that, except for the requested proposals, the council has released all responsive information. You assert that portions of the requested proposals may be protected from disclosure pursuant to section 552.110 of the Government Code. You raise no exception to disclosure on behalf of the council and make no arguments regarding the proprietary nature of the requested information. You have submitted a copy of the two proposals for our review.

Pursuant to section 552.305 of the Government Code, you notified Resource Consultants, Inc. ("Resource") and Newgate United Methodist Mission of Longview, Inc. ("Newgate"), of the request for information and of their opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Resource did not respond to the notice. Therefore, we have no basis to conclude that Resource's proposal contains proprietary information that must be withheld from disclosure. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish prima facie case that information is trade secret). However, Newgate did respond to the notice and asserts that

pages 18-33 and 42-43 of its proposal are excepted from disclosure pursuant to sections 552.102 and 552.104 of the Government Code.

Initially, we note that both proposals contain tax return information. Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes. Section 6103(a) of title 26 of the United States Code provides that tax return information, including a tax identification number, is confidential. Therefore, the federal tax return information in both proposals must be withheld from disclosure under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. These documents have been marked for your convenience.

We now address the arguments submitted by Newgate. Newgate argues that pages 42-43 of its proposal, which contain salary information of its employees, is information that is excepted from disclosure under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Section 552.102, however, only applies to employees of a governmental body. Accordingly, we will consider Newgate's privacy arguments under section 552.101 of the Government Code. Section 552.101 also encompassed the common law right to privacy. Information is protected by the common law right of privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983)*. In this instance, Newgate is proposing that the council fund the salaries of those Newgate employees who are involved in the Welfare-to-Work project. We believe that the details of such a financial transaction are a matter of legitimate public interest. Therefore, we conclude that the salary information on pages 42-43 of the Newgate proposal is not excepted from disclosure under the common law right of privacy and must be released.

Newgate claims that pages 18-33 of its proposal are excepted from disclosure under section 552.104 of the Government Code because release would give advantage to a competitor or bidder. We note that section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See Open Records Decision No. 592 at 8-9 (1991)*. This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453*

at 3 (1986). The council has not argued that the release of Newgate's proposal would harm its interests in a particular competitive situation. Therefore, pages 18-33 of Newgate's proposal may not be withheld under section 552.104 of the Government Code.

Newgate also claims that pages 18-33 of its proposal are protected under section 552.104 as confidential trade secret information. We note that section 552.110 of the Government Code is the appropriate exception to raise when arguing that information is protected as a trade secret. Accordingly, we will address the merits of your trade secret claim under that exception to disclosure.

Section 552.110(a) of the Government Code protects trade secrets of private parties. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law.¹ *See* Open Records Decision No. 552 at 5 (1990).

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

The "Overall Program Design" portion of the proposal was created exclusively for the Welfare-to-Work project; it is not "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 319 (1982) (information relating to organization, personnel, qualifications, and experience not ordinarily trade secret information). Accordingly, the information on pages 18-33 of the Newgate proposal are not excepted from disclosure pursuant to section 552.110 of the Government Code and must, therefore, be released.

In summary, you must withhold the marked tax return information in both proposals under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. The remaining information in both proposals must be released.

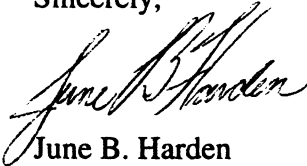
This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/RJB/seg

Ref: ID# 147766

Encl. Marked documents

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